

STOKES
BARTHOLOMEW
EVANS & PETREE

A PROFESSIONAL ASSOCIATION
ATTORNEYS AT LAW

NASHVILLE • MEMPHIS • MUSIC ROW

424 CHURCH STREET, SUITE 2800
NASHVILLE, TENNESSEE 37219-2386
(615) 259-1450 • FAX (615) 259-1470
www.stokesbartholomew.com

RECEIVED

2005 MAY -6 AM 11:15

T.R.A. DOCKET ROOM

CHARLES W. COOK III
CCOOK@STOKESBARTHOLOMEW.COM

DIRECT DIAL (615) 259-1456
DIRECT FAX (615) 259-1470

May 6, 2005

Via Hand Delivery

Pat Miller, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Re In Re Citizens Telecommunications Company of Tennessee, LLC's d/b/a
Frontier Communications of Tennessee
Docket No 04-00379

Dear Chairman Miller:

Enclosed for filing in the above-referenced proceeding are an original and fourteen copies of Frontier Communications, Inc.'s Response to Motion to Dismiss Filed by Ben Lomand Rural Telephone Cooperative, Inc

Should you have any questions, please do not hesitate to call

Very truly yours,

STOKES BARTHOLOMEW
EVANS & PETREE P.A.



Charles W. Cook, III

CWC/eu
Enclosures

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

**IN RE: PETITION OF FRONTIER
COMMUNICATIONS, INC. FOR
DECLARATORY RULING**

)
)
) **No. 04-00379**

**FRONTIER COMMUNICATIONS, INC.'S RESPONSE TO MOTION TO DISMISS
FILED BY BEN LOMAND RURAL TELEPHONE COOPERATIVE, INC.**

Frontier Communications, Inc ("Frontier") respectfully submits this response to the motion to dismiss filed by Ben Lomand Rural Telephone Cooperative, Inc ("Ben Lomand")

By Order, dated November 24, 2004 (Docket No. 04-00233), the Tennessee Regulatory Authority (the "Authority" or "TRA") approved an interconnection agreement (the "Interconnection Agreement") between Frontier and Ben Lomand, dated July 6, 2004 (with August 2, 2004 cover letter), a copy of which is attached to Frontier's Petition as Exhibit B. It provides as follows

13 1 This Agreement will become effective upon

(a) issuance of a final order by a regulatory body or court with the requisite jurisdiction to grant Citizens with all necessary regulatory approval and certification to offer local exchange and local exchange access services in the geographic areas to which this Agreement applies, and

(b) approval of this Agreement by the Commission

By Order, dated June 27, 1996, the TRA granted Frontier a statewide certificate of convenience (Docket No. 96-00779), and by its Order, dated November 24, 2004 in Docket No. 04-00233 (referenced above), the TRA has approved the Interconnection Agreement, stating "The agreement is in the public interest as it provides customers with alternative sources of

telecommunications services within the service area of [Ben Lomand] ” Order, dated November 24, 2004 (Docket No 04-00233)

Notwithstanding its willingness to enter into the Interconnection Agreement, citing T C A § 65-29-102, Ben Lomand remains steadfast that (a) Frontier cannot compete within its territory and (b) the TRA lacks jurisdiction to adjudicate Section 13 1(a) of the Agreement and determine that Frontier can provide services in Ben Lomand’s territory¹ However, notwithstanding Ben Lomand’s arguments, (a) the TRA has jurisdiction to decide this dispute pursuant to T C A § 65-29-130 and (b) any territorial protection granted by state law is preempted by 47 U S C 253(a).

I. The TRA Has Jurisdiction Over This Matter.

T C A § 65-29-130 provides that the TRA may exercise jurisdiction over telephone cooperatives such as Ben Lomand for “ (2) the hearing and determining of disputes between telephone cooperatives and any other type of person, corporation, association, or partnership rendering telephone service, relative to and concerning territorial disputes, ” T C A § 65-29-130(a)(2) Contrary to the arguments of Ben Lomand, this portion of T C A § 65-29-130(a) does not employ the word “boundary” but gives the TRA the jurisdiction to adjudicate “territorial disputes ”

Moreover, the Attorney General for the State of Tennessee has opined that if a telephone cooperative wants to provide service within an area served by a municipality, the TRA (then the “Public Service Commission”) has jurisdiction to decide the dispute pursuant to T C A § 65-29-

¹ Although Ben Lomand seeks to repel competition in its territory, it has formed a wholly-owned subsidiary, Ben Lomand Communications, Inc , which competes with Frontier’s affiliate Citizens Telecommunications Company of Tennessee, LLC in McMinnville and Sparta As is stated below, pursuant to T C A § 65-29-102, a telephone cooperative such as Ben Lomand would otherwise be prohibited from entering the areas served by those exchanges absent a showing that “reasonably adequate” phone service was unavailable

130 *See* Op Atty.Gen No 90-83, Aug 27, 1990 (copy attached) This case presents the same form of territorial dispute, namely one entity seeking to provide service within another entity's boundary without regard to a dispute about the boundary itself

In this case, Frontier wants to provide services in Ben Lomand's territory, and Ben Lomand contends that Citizens cannot enter its territory notwithstanding the fact that Frontier has approval from the TRA to provide state-wide coverage (which would include Ben Lomand's territory) and the fact that the TRA has approved the interconnection Agreement

II. T.C.A. § 65-29-102 Does Not Protect Ben Lomand's Territory, And, Even If It Did, It Is Preempted By 47 U.S.C. § 253(a).

Ben Lomand attempts to argue that it is protected by T C A § 65-29-102, which states, "Cooperative, nonprofit, membership corporations may be organized under this chapter for the purpose of furnishing telephone service in rural areas to the widest practical number of users of such service, provided, that there shall be no duplication of service where reasonably adequate telephone service is available " T C A § 65-29-102 However, this statute has been construed by the Tennessee Attorney General to prohibit telephone cooperatives from providing service where "reasonably adequate service is available" not as a means for a telephone cooperative to protect its own territory *See* Op Atty Gen No 90-83, Aug. 27, 1990.

Even assuming that this statute provides Ben Lomand with the ability to exclude a competing provider from entering its territory, 47 U S C § 253(a) unequivocally states, "No State or local statute or regulation, or other State or local requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service " 47 U S C § 253(a) Accordingly, the FCC has ruled that this statute preempts T C A. § 65-4-201(d), which was supposed to protect the territory of ILECs

with less than 100,000 lines *In The Matter Of AVR, L P d/b/a Hyperion of Tennessee, L P*
Petition for Preemption of Tennessee Code Annotated § 65-4-201(d) and Tennessee Regulatory
Authority Decision Denying Hyperion's Application Requesting Authority to Provide Service in
Tennessee Rural LEC Service Areas, 1999 WL 335803 (F C C), 14 F C C Rcd 11064 (1999),
pet for reh'g den , 2001 WL 12939 (F C C), 16 F C C. Rcd 1247 (2001) (Copies attached to
Petition Exhibit C) For this same reason, the federal statute should preempt T C A § 65-29-102
as anticompetitive

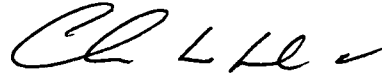
Consistent with 47 U.S.C § 253(a) and the FCC's ruling cited above, Tennessee's
legislature has stated that it is the policy of this state "to foster the development of an efficient,
technologically advanced, statewide system of telecommunication services by permitting
competition in all telecommunications services markets " T C A § 65-4-123 In fact, when
the TRA approved, the Certificate of Convenience for Ben Lomand's wholly owned subsidiary,
Ben Lomand Communications, Inc ("BLC"), to compete outside Ben Lomand's territory, it
held that the "application would inure to the benefit of the present and future public convenience
by permitting competition in the telecommunications services markets in the State . . ." See
TRA Order, dated April 28, 1999 (Docket No 98-00600)

In this case, Ben Lomand appears to favor competing outside its territory, but contrary to
the policies set forth by U.S Congress, the Tennessee legislature, the FCC and the TRA, it
resists competition when it comes knocking on its own door

CONCLUSION

For the reasons set forth herein, Ben Lomand's Motion to Dismiss should be denied, and Frontier should be granted the relief it seeks

Respectfully submitted,



Guilford F Thornton (No 14508)
Charles W Cook, III (No 14274)
STOKES BARTHOLOMEW
EVANS & PETREE, P A
424 Church Street, Suite 2800
Nashville, Tennessee 37219
(615) 259-1450

Attorneys for Frontier Communications, Inc

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by placing it in the U.S. Mail postage prepaid on this the 6th day of May, 2005

H LaDon Baltimore
Farrar & Bates, LLP
211 Seventh Avenue, N , Suite 420,
Nashville, Tennessee 37219

The Office of the Attorney General for the State of Tennessee
Consumer Advocate Division
P O Box 20207
Nashville, Tennessee 37202



Charles W Cook, III

Tenn Op Atty Gen No
 Tenn Op Atty Gen No 90-83, 1990 WL 513064 (Tenn A.G.)
 (Cite as: 1990 WL 513064 (Tenn.A.G.))

*1 Office of the Attorney General
 State of Tennessee

Opinion No. 90-83
 August 27, 1990

MUNICIPAL CORPORATIONS Municipal Powers

A municipality may not permit a telephone company to enter into business in the municipality when it is already being serviced by another telephone company, since the Tennessee Public Service Commission must first approve the entry of another telephone company into the municipality's territory, pursuant to T C A. § 65-4-107, a telephone cooperative is prohibited by T.C.A. § 65-29-130 from providing service in an area where "reasonably adequate telephone service is available", the question of whether a particular area already has "reasonably adequate telephone service" is an issue to be resolved by the Tennessee Public Service Commission, which has jurisdiction under T C A § 65-29-130 to establish a telephone cooperative's territorial boundaries and to resolve territorial disputes arising between a telephone cooperative and any other type of person, corporation, association, or partnership rendering telephone service T C.A. § 1-3-103, § § 65-4- 104, -107, -201 et seq , -207, § § 65-29-101 et seq , -102, - 130.

PUBLIC SERVICE COMMISSION.

A municipality may not permit a telephone company to enter into business in the municipality when it is already being serviced by another telephone company, since the Tennessee Public Service Commission must first approve the entry of another telephone company into the municipality's territory, pursuant to T C A. § 65-4-107, a telephone cooperative is prohibited by R.C.A. § 65-29-130 from providing service in an area where "reasonably adequate telephone service is available", the question of whether a particular area already has "reasonably adequate telephone service" is an issue to be resolved by the Tennessee Public Service Commission, which has jurisdiction under T C.A. § 65-29-130 to establish a telephone cooperative's territorial boundaries and to resolve territorial disputes arising between a telephone cooperative and any other type of person, corporation, association, or partnership rendering telephone service T C A § 1-3-103, § § 65-4- 104, -107, -201 et seq , -207, § § 65-29-101 et seq., -102, - 130

PUBLIC UTILITIES AND CARRIERS. Regulation of Public Utilities

A municipality may not permit a telephone company to enter into business in the municipality when it is already being serviced by another telephone company, since the Tennessee Public Service Commission must first approve the entry of another telephone company into the municipality's territory, pursuant to T.C.A. § 65-4-107, a telephone cooperative is prohibited by T.C.A. § 65-29-130 from providing service in an area where "reasonably adequate telephone service is available", the question of whether a particular area already has "reasonably adequate telephone service" is an issue to be resolved by the Tennessee Public Service Commission, which has jurisdiction under T C A. § 65-29-130 to establish a telephone

cooperative's territorial boundaries and to resolve territorial disputes arising between a telephone cooperative and any other type of person, corporation, association, or partnership rendering telephone service T.C.A. § 1-3-103, § § 65-4-104, -107, -201 et seq, -207, § § 65-29-101 et seq, -102, -130

*2 TELEPHONE

A municipality may not permit a telephone company to enter into business in the municipality when it is already being serviced by another telephone company, since the Tennessee Public Service Commission must first approve the entry of another telephone company into the municipality's territory, pursuant to T C A § 65-4-107, a telephone cooperative is prohibited by T C A. § 65-29-130 from providing service in an area where "reasonably adequate telephone service is available", the question of whether a particular area already has "reasonably adequate telephone service" is an issue to be resolved by the Tennessee Public Service Commission, which has jurisdiction under T C A. § 65-29-130 to establish a telephone cooperative's territorial boundaries and to resolve territorial disputes arising between a telephone cooperative and any other type of person, corporation, association, or partnership rendering telephone service. T.C.A. § 1-3-103, § § 65-4-104, -107, -201 et seq, -207, § § 65-29-101 et seq, -102, -130.

Authority of Municipality to Permit a Competing Telephone Company or Cooperative Within its Jurisdiction

The Honorable Jerry W. Cooper
State Senator
Room 307, War Memorial Building
Nashville, Tennessee 37243-0214

QUESTIONS

(1) Whether a municipality may permit a telephone company to enter into business in the municipality when it is already being serviced by another telephone company?

(2) Whether a telephone cooperative organized under T.C.A. § 65-29-101 et seq can conduct business in a municipality which already possesses existing telephone service administered by a telephone company?

OPINIONS

(1) No, since the Tennessee Public Service Commission must first approve the entry of another telephone company into the municipality's territory, pursuant to T C A. § 65-4-107.

(2) A telephone cooperative is prohibited by T C A. § 65-29-102 from providing service in an area where "reasonably adequate telephone service is available " The question of whether a particular area already has "reasonably adequate telephone service" is an issue to be resolved by the Tennessee Public Service Commission, which has jurisdiction under T C A § 65-29-130 to establish a telephone cooperative's territorial boundaries and to resolve territorial disputes arising between a telephone cooperative and any other type of person, corporation, association, or partnership rendering telephone service

ANALYSIS

The establishment, regulation and control of public utilities, including telephone companies, is governed by Chapter 4 of Title 65 of the Tennessee Code. Chapter 4 is divided into three specific parts, with part 1 detailing the general provisions of Chapter 4, part 2 addressing the certificate of public convenience and necessity required of each public utility, and part 3 detailing both the Commission's powers to inspect and control public utilities as well as the supervision fee required to be paid by public utilities.

*3 T C A § 65-4-104, contained in part 1 of Chapter 4, grants the Tennessee Public Service Commission general supervision and regulation of, and jurisdiction and control over, all public utilities, and also over their property, property rights, facilities and franchises. T C A. § 65-4-107, also in part 1, specifically provides that no privilege or franchise granted to any public utility by the State of Tennessee or by any political subdivision thereof shall be valid until approved by the Public Service Commission, with such approval to be given after a hearing and a determination by the Commission that such privilege or franchise "is necessary and proper for the public convenience and properly conserves the public interest."

Part 2 of Chapter 4, codified at T.C.A. § 65-4-201 et seq, provides that no public utility shall establish or begin the construction of, or operate any line, plant, or system, or route in or into a municipality or other territory already receiving a like service from another public utility, or establish service therein, without first having obtained from the Tennessee Public Service Commission, after written application and hearing, a certificate that the present or future public convenience and necessity require or will require such construction, establishment and operation. T.C.A. § 65-4-207 however provides that the "provisions of this part shall not apply where any municipality or county by resolution or ordinance declares that a public necessity requires a competing company in that municipality or county." (Emphasis added)

The initial question raised in this opinion request focuses on these provisions, and specifically whether T C A. § 65-4-207 grants a municipality the authority to permit a competing telephone company to come into the municipality when the Public Service Commission has not approved the competing telephone company's entry into the territory of the municipality. The Tennessee Supreme Court in 1933 definitively answered this question in the negative in the case of Holston River Electric Co. v Hydro Electric Corp, 166 Tenn 662, 64 S.W.2d 509 (1933).

In that case, the town of Rogersville had issued in 1932 a franchise to the Hydro Electric Corporation, authorizing it to distribute and sell electric power within Rogersville, without the approval of the Railroad and Public Utilities Commission, the predecessor to the Public Service Commission. At the time this municipal franchise was granted to the Hydro Electric Corporation, Holston River Electric Company was exercising a similar franchise granted to it by Rogersville in 1926 for a term of 25 years. Holston River Electric Company commenced litigation seeking an injunction restraining the Hydro Electric Corporation from operating under its franchise unless it was approved by the Public Utilities Commission, as required by section 5453 of the Tennessee Code, presently codified at T C A § 65-4-107.

Hydro Electric Corporation contended that the approval of the Public Utilities Commission was not necessary, since section 5508 of Code, presently codified as T C A § 65-4-207, allowed a municipality by resolution or ordinance to declare that a public necessity required a competing company in the municipality. The Court found that a municipality could not by itself authorize such a competing telephone company, even under present § 65-4-207, reasoning as follows.

*4 Section 5453 of the Code, in article 1 of chapter 23 [presently codified as T C A § 65-4-107], deals specifically with franchises granted to public utilities by the state or its subdivisions, and expressly makes the approval of the Railroad and Public Utilities Commission [now the Public Service Commission] a condition precedent to the validity of any such franchise. This provision embodies a most important matter of public policy, which we cannot presume the Legislature would either adopt or discard without plainly and deliberately expressing its intention

Sections 5502-5508, comprising article 2 of the same chapter of the Code [presently codified at T C A § 65-4-201 et seq], do not deal with franchises, but directly refer to and purport to regulate physical operations of public utilities. Since no such operations may be undertaken by a company not in possession of a franchise, whenever one is required, by law, it would seem that the regulations and control prescribed by these sections were intended to apply to and affect a utility, already holding any required franchise with the commission's approval, which might be about to engage in some specific operation in competition with another similar company. The certificate of public convenience and necessity required by these sections is clearly in addition to and not a substitute for the commission's approval of the franchise, required by section 5453. [T.C.A § 65-4-107]

Giving effect to the rule of construction prescribed in section 13 of the Code. [FN1] as well as to the general rule that the various sections of the Code must be reconciled if their language reasonably permits it (Dagley v State, 144 Tenn , 501, 507, 508, 234 S W., 333), we are of opinion and so hold that the Code sections 5502-5508 were not intended to and do not repeal the provision of section 5453 which requires the approval of the Railroad and Public Utilities Commission as a condition to the validity of all franchises included in that section. Holston River Electric Co v Hydro Electric Corporation, 166 Tenn 662, 667-668, 64 S W.2d 509 (1933). See also Briley v Cumberland Water Co , 215 Tenn. 718, 727-728, 389 S W 2d 278 (1964) (Supreme Court stating that a municipality could not grant a valid franchise to a utility without the approval of the Public Service Commission, given after a hearing in which the Commission determines the franchise is necessary and proper for the public convenience and properly conserves the public interest)

Thus it appears that even though a municipality under T C A § 65-4-207 may authorize a telephone company and dispense with the necessity of obtaining a certificate of convenience and necessity under § § 65-4-201 to -206, the approval of the Public Service Commission is still necessary pursuant to T C A § 65-4-107 before the telephone company may operate

Secondly, a municipality can only allow a telephone cooperative organized under T C A § 65-29-101 et seq (the Telephone Cooperative Act) to conduct business in the municipality if it is determined under T C A § 65-29-102 that "reasonably adequate telephone service" is not available to the municipality. Very unusual circumstances would have to be shown before a municipality already being serviced by a telephone company would qualify to be serviced by a telephone cooperative

[FN2] In any event, the ultimate question of whether a telephone cooperative could enter the territory of such a municipality is one for the Public Service Commission, since T C A § 65-29- 103 grants the Commission jurisdiction to resolve any territorial disputes between a telephone cooperative and any other entity rendering telephone service

*5 Charles W Burson

Attorney General and Reporter

John Knox Walkup

Solicitor General

William E Young

Assistant Attorney General

[FN1] Section 13, now codified at T C A § 1-3-103, declares, "[i]f provisions of different chapters or articles of the Code appear to contravene each other, the provisions of each chapter or article shall prevail as to all matters and questions growing out of the subject matter of that chapter or article."

[FN2] Even in those circumstances, the terms of the franchise granted to the existing company would be relevant in determining its rights versus those of a competing cooperative

Tenn Op Atty Gen No 90-83, 1990 WL 513064 (Tenn A G)

END OF DOCUMENT